IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FREDERICK L. DENMAN, *Plaintiff in Error,* vs. CHARLES RICHARDSON, *Defendant in Error.*	No. 3993

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

REPLY BRIEF OF PLAINTIFF IN ERROR

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This court has not jurisdiction to consider that part of the brief of defendant in error, commencing on page 32 (thirty-two) and ending on page 57 (fifty-seven), and the first paragraph under the heading "Conclusion" on page 112(one hundred and twelve), wherein he is complaining of errors of the lower court in not sustaining his demurrer to the complaint and in not holding that this was a law, and not an equity action, for the reason that the defendant in error is there attempting to argue in this court points that were raised by him in the lower court by motions and demurrers, and which were all decided adversely to him by the lower court in written opinions after exhaustive briefs and from which decisions the defendant in error has not appealed, and which points are not embraced in the assignments of error of the plaintiff in error.

Errors prejudicial to appellees or respondents not appealing can not be considered.

Rockford Shoe Co. v. Jacobs, 6 Wash. 421; 33 Pac. 1057;

Sitton v. Dubois, 14 Wash. 624; 45 Pac. 303;

Pepperal v. City Park Transit Co., 15 Wash. 176; 45 Pac. 743;

Tacoma v. Tacoma Etc. Co., 17 Wash. 458; 50 Pac. 55;

Whiting v. Doughton, 31 Wash. 337, 71 Pac. 1026;

Watson v. Sawyer, 12 Wash. 335; 40 Pac. 413;

Lawyer's Land Co. v. Steel, 41 Wash. 411; 83 Pac. 896;

Sullivan v. Seattle Elec. Co., 44 Wash. 53; 86 Pac. 786;

Winningham v. Philbrick, 56 Wash. 38; 105 Pac. 144;

Kosch V. Nitzky v. Hammond Lbr Co., 57 Wash. 320; 106 Pac. 900;

Thompson v. Koch, 62 Wash. 438, 113 Pac. 1110;

Perolin Co. v. Young, 65 Wash. 300 ;118 Pac. 1;

Akers v. Lord, 67 Wash. 179; 121 Pac. 51;

Grant v. Huscke, 70 Wash. 174; 126 Pac. 416;

Hammond v. Hillman, 73 Wash. 298; 131 Pac. 641;

Augerson v. Seattle Elec. Co., 73 Wash. 529; 132 Pac. 222;

Jones v. Grove, 76 Wash. 19; 135 Pac. 488;

Burgess v. Peth, 79 Wash. 298; 140 Pac. 351;

Duffy v. Blake, 91 Wash. 140; 157 Pac. 480;

Booth v. Bassett, 82 Wash. 95; 143 Pac. 449;

Bremerton v. Bremerton Water & Power Co., 88 Wash. 362; 153 Pac. 372;

Simmons v. N. P. R. Co., 88 Wash. 384; 153 Pac. 321;

Shanstrom v. Case, 103 Wash. 672; 175 Pac. 323;

Swager v. Smith, 194 Fed. 763, 765;

Philadelphia Casualty Co. v. Theckheimer, 220 Fed. 401, 418;

Bolles v. Outing Co. (U. S. Supreme Ct.) 44 L. Ed. 156, 158;

Thus in *Swager v. Smith,* 194 Fed. 763, it was held that

> "Mere assertion of error in appellee's brief, where no cross appeal was taken, was insufficient to confer jurisdiction on the appellate Court to review the error alleged."

And the Court in this case on page 765 uses the following language:

> "The appellees have not taken a cross appeal. Mere assertion of error in an appellee's brief does not give this Court jurisdiction to review alleged error against an appellee."

and the Court cites a mass of Supreme Court decisions sustaining the proposition.

Again in the case of *Philadelphia Casualty Co. v. Theckheimer,* 220 Fed. 401, it was held that

> "A defendant in error, who did not himself institute proceedings in error, cannot in the appellate court go beyond supporting the judgment and opposing the assignments of error by the adverse party."

and the Court on page 418 uses the following language:

> "Plaintiffs complain of certain rulings of

> the Court, but as they did not appeal from the judgment, they cannot in this Court go beyond supporting such judgment and opposing every assignment of error."

and the Court having sustained such proposition quotes a mass of Federal and Supreme Court decisions.

Again in the case of *Bolles v. Outing Company,* 44 L. Ed. 156, it was held that

> "A defendant who did not take out a writ of error cannot be heard to complain of any adverse rulings in the Court below, on writ of error taken by the plaintiff,"

and on page 158, near the bottom, uses the following language:

> "It is sufficient to say of these that the defendant did not take out a writ of error and cannot now be heard to complain of any adverse rulings in the Court below,"

and the Court cites a mass of Supreme Court decisions to sustain its statements.

The decisions sustaining this proposition all over America are legion and we will not attempt to cite all of them, but call the Court's attention only to the following:

Benson v. Bunting, (Cal.) 75 Pac. 59;

Reese v. Damato, (Fla.) 33 So. 462;

Adams v. Long, (Ill.) 114 Ill. App. 277;

Remster v. Sullivan, (Ind.) 75 N. E. 860;

J. P. Calnan Const. Co. v. Brown, (Iowa), 81 N. W. 163;

Gregory v. Root, (Ky.) 91 S. W. 1120;

McCabe v. Farnsworth, (Mich.) 27 Mich, 52;

Pullman Co. v. Kelly, (Miss.) 38 So. 317;

Sarazin v. Union R. Co., (Mo.) 55 S. W. 92;

Dolan v. N. Y. Sanitary Utilization Co. 93 N. Y. S. 217;

Tacoma v. Tac. Lt. & *Water Co.,* (Wash.) 47 Pac. 738;

Counsel, under the heading *"Quantum Meruit,"* quotes Article II, section 1, of the by-laws, providing that

> "It shall be the duty of the president to preside at all meetings of the directors and stockholders, and to sign with the secretary all bonds, deeds, certificates of stock, promissory notes, or other instruments in writing made or entered into in behalf of the Company"

and contends that the payment to the president of $12,000 a year, and two and one-half per cent bonus, was for the performance of these duties, and that as the liquidation of the company was not within these duties, there was an implied contract to pay him for such liquidation. This argument is plausible, but unsound. If defendant received $12,000 a year solely for performing the duties above enumerated, the minutes and testimony fail to disclose this fact, and as there was no preceding resolution, or contract, authorizing him to receive such a salary, an action could lie on our part to recover same. But, the whole record shows that the defendant acted as general manager and practically ran the company from

1912 to October, 1918, (Trans. pp. 110, 179), and that his duties up to November, 1917, were to run an active corporation, and that from November 1, 1917, until the end of December, the company was in process of liquidation, and his duties were to liquidate a dormant corporation; and that his pay from 1912 to November, 1917, was for running a going concern, and from November, 1917, to September, 1918, (at which time the need for the president ceased), for assisting in liquidating a retiring corporation. This statement is borne out by the record. Thus, on April 24, 1918, the trustees approved of the sale of all of the Tacoma plant and assets in Alaska and its steamers and a sale of four markets and a ranch and lease, and resolved to reduce the capital stock from a million to five hundred thousand dollars (see exhibit 1, p. 321), and on May 31, 1918, the stockholders approved all of the sales made by the officers and resolved that

> "Whereas it is the desire of the stockholders that the company should be liquidated, and all of its assets sold, and that a return of capital be made as speedily as possible, therefore,
>
> "Be It Resolved, That the officers of this company are directed to sell and dispose of all of the assets of the company as rapidly as possible, and wind up its affairs, returning to the shareholders the amount realized therefor."

and again on July 10, 1918, resolved that

> "Whereas, at the annual meeting of the stockholders of this company, held on May 31, 1918, it was resolved that this company should

be liquidated and all of its assets sold and a return of capital made as speedily as possible, therefore,

"Be It Resolved, That the stockholders present in person and by proxy, hereby confirm and approve the said resolution and authorize, and empower the trustees to make all contracts, agreements and sales necessary to be made, to fully carry out said resolution, hereby confirming and approving what they may do in the premises."

So that Richardson, of his own initiative, liquidated the assets, and the board of directors by express authority authorized and directed him to dispose of the assets of the company and ratified his past acts. The officers of the corporation in one resolution were authorized to sell and dispose of the assets. If Richardson was entitled to be paid on a *quantum meruit* an additional sum to his regular annual salary, then so was Denman, Moore, Davis and the other officers of the corporation, because they did practically nothing else from November, 1917, on. The defendant is riding this implied agreement horse to death. It is clear that there could be no implied agreement to pay the defendant five per cent commission for his services when he is already receiving $12,000 a year for the same services.

All of the cases cited by counsel for the defendant in error are cases where the director or trustee was clearly acting outside the scope of his duties, but in this particular case on May 31, 1918, it was resolved that the company should be liquidated and the defendants Stacy, Miller, Davis, Seddon and

Moore were appointed as trustees to carry out this purpose, and on July 10, 1918, the stockholders expressly authorized and empowered such trustees to make all contracts, agreements and sales necessary to liquidate the company. (See Exhibit 1, minutes p...). So that the Trustees, on May 31, 1918, directed all of the officers to liquidate the company, and on July 10, 1918, expressly imposed on defendant and the other trustees the duty of liquidating the company, and did not make any provision for his compensation until after these duties had been performed, and that too, by an *ex post facto* resolution passed by a board of dummy directors under his dominion and control and picked by himself by use of proxies he held.

The facts in this case afford every reason to apply the rule prohibiting compensation not provided for in advance. All of defendant's pleading and his evidence shows a consistent scheme of deception practiced upon the shareholders. He says in his pleadings that he was required to certify to the alleged correspondent of the foreign shareholders all resolutions of the Board of Trustees. The fact that he procured no such resolution in 1912 when he commenced taking the two and one-half per cent from the corporate funds in addition to his salary, shows his claims to their consent are without foundation and he did not want them to know what he was taking. So also his failure to provide for the five per cent by resolution when liquidation was determined upon . In September, 1918, he lulled the share-

holders by a formal resolution discontinuing his salary. Not even then, months after the work of liquidation had been going on did he openly provide for any further compensation. He did not dare even then to submit his claims to the scrutiny of the shareholders.

If Richardson did not cause his salary to be provided for by resolution in 1912, the reason is that he schemed for more. A sanctioned resolution for only one thousand dollars a month would have stopped him at that. Honesty and fidelity to a trust demand strict application of the rule in this case. Shareholders have little enough protection as it is, and that little through costly, vexatious litigation which amounts to a denial of justice to men of small means. No such chance should be afforded for dishonesty to triumph and honesty to be the light that fails. Economic and moral considerations both control this case and we respectfully submit that the plaintiff in error should prevail.

Authorities Sustaining Court's Rulings in Our Favor

Since the foregoing was printed this Court on the oral argument extended us the privilege of presenting authorities sustaining the rulings in our favor by the trial Court—rulings not appealed from by the defendant.

We respectfully submit that the cases cited in the first part of this brief clearly show that this court has not jurisdiction to consider alleged errors

not appealed from by the court. We gladly avail ourselves of the privilege extended by the Court and following are the authorities upholding the rulings of the lower court against the defendant, showing that our pleadings stated a cause of action, that the Pacific Cold Storage Company is neither a necessary or a proper party, and that this action is one at law and not an equity suit. To save the time of the Court we take the liberty of briefly repeating the pertinent paragraphs of our brief. Our citations possess the merit which defendants citations do not —that of being in point.

FACTS OF CASE

The plaintiff alleges in paragraph 1 of his first cause of action the legal existence of the Pacific Cold Storage Company from the 8th of April, 1897, until the first day of May, 1918, and then uses the following language:

"That after May 1, 1918, said corporation ceased to do business and on May 31, 1918, at the regular annual meeting of the stockholders of said corporation for that year said stockholders voluntarily and unanimously voted to dissolve said corporation and instructed its officers and trustees to sell all of its property, collect all money due to it and distribute the proceeds and all accumulated funds to its stockholders; that from and after the first day of May, 1918, the said company did no new business and abandoned the purposes for which it was incorporated and disposed of an integral and major part of

its assets and paid all of its debts and was dissolved on or before July 1, 1919, and that a formal order of dissolution was made and entered on the 2d day of June, 1919, in the Superior Court of the State of Washington in and for Pierce County.

II

"That the capital of said corporation from and after April 10, 1901, was the sum of One Million dollars divided into ten thousand shares of the par value of One Hundred Dollars each. That at the time said corporation ceased to do business Frederick L. Denman owned 60 of said shares; that said shareholder remained at all times since owner of the funds of said corporation to be distributed to him upon dissolution on his shares as such former stockholder.

III

"That during the existence of the said Pacific Cold Storage Company the profits realized from its business each year were in part declared to be dividends and to the amount so declared paid as dividends to the shareholders of said corporation; that the profits not so declared to be dividends were retained and accumulated by said company and at the time said company ceased to do business and dissolved were available to said shareholders with the exception of the portion unlawfully appropriated by defendant as stated in following paragraphs.

IV.

"That in each year commencing with the year 1912 and ending with the year 1918 the defendant,

without authority from said corporation, its trustees or its stockholders, and while acting as Trustee and President, wrongfully and unlawfully misappropriated and converted to his own use from said accumulated funds and undivided profits an amount equal to two and one-half per cent of amount paid to said shareholders as dividends, as follows, to-wit:

Date	Dividends	Amount Taken
January, 1912	$100,000.00	$2,500.00
January, 1913	100,000.00	2,500.00
January, 1914	100,000.00	2,500.00
January, 1915	60,000.00	1,500.00
January, 1916	80,000.00	2,000.00
January, 1917	80,000.00	2,000.00
January, 1918	200,000.00	5,000.00

Total Dividends $720,000.00.

Total taken by Defendant, $18,000.00.

V.

"That of the amounts so wrongfully and unlawfully taken as above set forth there belonged to the stock of F. L. Denman and became due therein from the defendant on dissolution of said corporation the sum of $108.00 and interest on said amount at the legal rate of six per cent per annum from and after the 31st day of May, 1918, the date of the dissolution of said company."

In paragraph "VI" plaintiff sets forth when he acquired his shares.

The second cause of action is on the assigned claim of Miller and pleads substantially the same

facts as set forth in the first cause of action, the only difference being in the figures and dates.

In the third cause of his action paragraphs "I" and "II" are the same as paragraphs "I" and "II" of the first cause of action. And then the third cause of action alleges as follows:

III.

"That while acting as such trustee for the shareholders after said company had ceased to do business, the defendant without any consideration whatever, wrongfully, and unlawfully appropriated to his own use from the capital return of said corporation, certain sums at the times and in the amounts stated as follows, to-wit: In or about the month of January, 1919, the sum of $25,000.00; in or about the month of June, 1919, the sum of $25,-000.00; and in or about the month of January, 1920, the sum of $2,500.00, making a total of funds so misappropriated by the defendant to his own use in the amount of $52,500.00; That the amount to taken was $5.25 for each share and included $315.00 belonging to F. L. Denman on his 60 shares.

IV.

"That there is now, therefore, due and owing from the said Charles Richardson for money so had and received by him to the use of the plaintiff the sum of $315.00 together with interest at the legal rate of six per cent per annum on said amount from and after the month of January, 1920."

And then said paragraph "IV" alleges a formal demand.

In paragraph "V" the plaintiff sets forth the date of acquisition of his shares.

The fourth cause of action is on the assigned claim of Miller and sets forth substantially the same facts as in the third cause of action with only such modification as is necessary in numbers of shares and figures and dates.

Rights of Stockholders in Assets of Dissolved Corporation

What is the law on these facts? Judge Miller says in 21 Fed. Cas. page 311:

> "That in case of an incorporated company with a capital stock divided into shares, and held by individuals, the corporation and the shareholders are distinct legal persons, and can sue and be sued by each other.
>
> "When the directors of a corporation have misapplied a portion of its funds to which a shareholder has a distinct right, as, for instance, a dividend, he may, in an action, recover the amount misapplied; and when such misapplication has not been effected, but is threatened, he may, by bill in equity for an injunction, prevent it."

So that if either a corporation or an individual misappropriates a dividend on my stock I can sue either the individual or the corporation, and why? Because I have the legal and equitable right to that

dividend. The corporation ship has landed that much of her cargo and it is mine.

It follows as a natural corollary from the above quoted law that when a corporation has gone out of business and is in process of liquidation and has paid all outstanding debts, the corporate property whether in form of real estate or cash, is no longer the property of the corporation and as such subject to whatever disposition may be decreed by the majority of the stockholders but is the several separate vested property of each individual stockholder of which he can not be deprived without his consent; and if the corporate officers wrongfully deprive anyone of the stockholders of his capital stock or any part thereof, it would be an individual and not a corporation injury and he could bring suit against such officers in his own name, and the corporation would be both an unnecessary and an improper party to the suit.

Thompson on Corporations, Sec. 6589;

Slee vs. Bloom, (N. Y.) 10 Am. Dec. 273;

Mason v. Pewabic Co. (U. S.) 33 L. Ed. 524;

Luehrmann vs. Lincoln Trust & Title Co., (Mo.) 112 S. W. 1036;

Aalwyns Law Institute vs. Martin, (Cal.) 159 Pac. 158;

Rossi vs. Caire (Cal.) 161 Pac. 1161;

See also

Eltringham vs. Clarke, (La.) 21 So. 547;

Graycraft vs. National Building & Loan Association, (Ky.) 79 S. W. 923;

Bixler vs. Summerfield et al, 62 N. E. 849;

Von Arnim et al. vs. American Tube Works et al., 74 N. E. 680;

Schoening et al. vs. Schwenk et al., 84 N. W. 916.

In *Thompson on Corporations,* Section 6589, it said:

> "Ordinarily and in the absence of debts, the stockholders, on dissolution of the corporation, become the owners of and entitled to the distribution of its assets. And even where the existence of the corporation is continued by statute for the purpose of winding up, if the debts are paid there is no reason why the stockholders may not at once take the property and distribute it as they may see fit."

In *Mason vs. Pewabic Mining Co.,* (U. S.) 33 L. Ed. 524, the court uses the following language:

> "We know of no reason or authority why those holding a majority of the stock can place a value upon it as which a minority must sell or do something else which they think is against their interest more than a minority can do. We do not see that the rights of the parties in regard to the assets of this corporation differ from those of a partnership on its dissolution."

So in the absence of debts the stockholders on dissolution are the owners of all of its assets whether capital stock or accumulated dividends. Even if a receiver were winding up a corporation and all of its debts had been paid and the receiver withheld and refused to return to any one of the stockholders his capital stock or accumulated profits or any part

thereof, the stockholders would have a right of action against and could sue the receiver. If one or five trustees were winding up a dissolved corporation and it was shown that all of its debts were paid and that all or any one of such trustees were misappropriating or withholding the capital stock or accumulated profits of any one of the stockholders, such stockholder could sue one or all of such trustees. But according to the learned counsel for the defense the stockholder could not sue the receiver. The receiver must sue himself. Or, in case of the trustees the stockholder could not bring an action against the trustees for their own wrong but must ask the trustees to redress their own wrong. I know of no better exposition of the fallacy of this reasoning than the following language used by Judge Neterer in the decision filed in this case on May 8, 1920, where he says:

> "nor do I think that there is a misjoinder of parties plaintiff or defendant, where an officer or trustee of a corporation is guilty of misconduct equivalent to a breach of trust, or where they stand in a dual relation which prevents an unprejudiced exercise of judgment, that it is necessary for a stockholder to exhaust his remedies through the corporation or to show by allegations that the corporation is in the control of the alleged wrongdoers. This was stated by the Supreme Court in *United Copper Co. v. Heinze,* 224 U. S. 265. It is clearly stated in the amended complaint that the defendant wrongfully appropriated the various sums. It likewise appears in the second cause of action that the liquidation of the corporation was affected July 1, 1919. Under the laws of Washington,

the trustees, upon the dissolution of a corporation, become trustees for the shareholders. Upon the dissolution of the corporation, the defendant became one of the trustees of the stockholders, and persons entitled to dividends, and an obligation rested upon him to account to the plaintiffs for the dividends to which they were entitled, and upon failure to account for the dividends, a cause of action arose against the trustee. The fact that there may have been other trustees would not require the plaintiffs to pursue such trustees as joint wrongdoers. The plaintiffs could elect to pursue any or all of the wrongdoers. The demurrer is a general demurrer to both counts, and a cause of action is stated."

Again in his opinion filed on July 12, 1921, Judge Neterer uses the following language:

"By the same token upon the dissolution of a corporation, the trustees at the time of the dissolution shall be trustees of the *creditors* and *stockholders*, Sec. 3707 Rem. & Bal. Code 'and shall have full power and authority to sue for and recover the debts and property of the corporation.' Upon dissolution of the corporation, the corporate entity ceased. The corporation has no power to sue. All rights of the corporation are ended, and the property and funds of the corporation are vested in the trustees for the *stockholders*. All debts are paid, it is alleged. The trustees are trustees not of the corporation, but by operation of statute, of the individual stockholders, to the extent of the interest of the stockholder in the fund or property. If the trustee is guilty of wrongdoing, the remedy of the stockholders cannot be through the corporation because it has no entity. It is alleged that the defendant misappropriated the funds while acting as trustee for the stockholders. There is, therefore, no occasion for any action on the part

of the trustee. It is charged that the defendant trustee has the funds, and declines to account for them, nor is it necessary to bring an action to declare a trust, as in *Southern Pacific Co. vs. Bogert,* 250 U. S. 483, or in *Barker vs. Edwards,* 259 Fed. 484, because the trust is established by statute. The action is not in tort but for money had and received, and can be maintained only against the party who has the funds. *Simmons vs. Spencer,* 9 Fed. 581."

We will not attempt to give over again all of the many cases on which the court's decision is based but will only select one or two well worded decisions.

In the case of *Dill v. Johnson,* (Okla.) 179 Pac. 608, it was held that where a majority of the stockholders have combined to so manage the business of the corporation as to divert all the profits of the enterprise from their legitimate destination, and to appropriate them to their own use, and have in part executed their plan, and the circumstances render any change in the personnel of the management impracticable, a proper case has arisen for the intervention of the court to make a division of the assets. And the court on page 611 uses the following language:

"Plaintiff complains that this suit should be in the name of the corporation and permit the defendant to account to the corporation. The evidence discloses that the defendant Dill did or attempted to show that all of this property had been accounted for to the corporation, but the court and referee found otherwise. To apply the rule of the defendant to an action of this kind

in our judgment would be to nullify the decision of the court. The result would be, the court, after deciding that Mr. Dill had appropriated over $20,000 of the corporation's property, and all the property the corporation had to his own use and benefit, it would then say to Mr. Dill, now you, as president and manager of this corporation, proceed at once to collect this from yourself. Could it be said that would grant the plaintiff in this case any relief? It becomes more apparent that this would still be fruitless, for the reason the attorney representing the corporation also represented Mr. Dill and on behalf of the corporation filed a motion asking that the finding of the referee be set aside, and asked that the judgment be set aside. To permit such a procedure, the ultimate effect would be to grant the plaintiff no relief. He would be in the same position that he had been in since the year 1908. He had invested his money in this corporation, received no dividends, and Mr. Dill, according to the findings of the referee, has converted all the property to his own private use."

Another reason of the futility of requiring plaintiff to bring the action in the name of the trustees is that even if he could prevail upon them to bring suit it would be their duty to immediately turn this money over to plaintiff himself. It would be what the law calls a dry trust. The reasoning of the court in the case of *Dill vs. Johnson,* 179 Pac. 608, cited above is pertinent where the court says:

"If there was property except what had been turned into cash, and had not been appropriated by the defendant Dill to his own use, it might have been necessary, as has often been done, to appoint a receiver to take charge of the assets and to wind up the affairs of the corpora-

tion and to distribute the same; but there is no showing of any property that the corporation has, but on the contrary the court finds that it had none.

"All a receiver could do in the case at bar under the judgment would be to collect from Mr. Dill over $20,000 and pay Mr. Johnson his proportionate part and return to Mr. Dill the balance. This would be a useless and unnecessary expense and procedure, and the same result would be reached by directing Mr. Dill to account to the plaintiff herein direct for his proportionate part of the money that Mr. Dill owes the corporation."

The case of *Commonwealth Title Insurance & Trust Company vs. Seltzer,* 76 Atl. 77, was one in which the corporation was still in existence and the defendant was contending that the corporation should have brought the suit on plaintiff's, the stockholder's behalf and the court held that this was unnecessary and used the following language:

"All that the plaintiffs are entitled to recover is the same share of the ascertained profits that they would have received had these profits gone into the treasury of the company, instead of into the pockets of the two defendants; and this was the proportion awarded to each of them by the court below."

Not only do the state courts approve of the stockholder proceeding directly against defrauding officers, directors or stockholders, but also the Federal courts. Thus in the case of *Ervin vs. Ore. Ry. & Nav. Co.,* 20 Fed. 577, it is held that where the corporation is practically dissolved, and all its prop-

erty sold by the action of the directors and a majority of the stockholders, the minority stockholders may maintain a suit in equity directly against the persons who have thus dissolved the corporation, and who have purchased the property at an unfair price, for an accounting, without making the corporation a party. And it was further held in the same case that such a suit may be brought by one or more of the minority stockholders without making the other minority stockholders parties. And the court in that case on page 581 uses the following language:

> "The defendants insist, by their demurrers, that the Oregon Steam Navigation Company is an indispensable party to the controversy. They also insist, in argument, that all of the stockholders of that company are indispensable parties, if the corporation is not a party. There does not seem to be any good reason why the Oregon Steam Navigation Company should be deemed an indispensable party. It is not a going concern. If the sale of the property should be set aside the corporation would be only a dry trustee for the purpose of dividing the property among the beneficial owners."

Again it was held by the Supreme Court of the United States in the case of *Southern Pacific Co. vs. Bogert,* 250 U. S. 482; 63 L. Ed. 1099, that to a suit to require a majority stockholder which, through a reorganization agreement, has acquired all the stock in the reorganized corporation, to account as trustee for the minority stockholders, the old corporation is neither an indispensable nor proper party. And the

court on page 492, L. Ed. page 1108, uses the following language:

> "The Southern Pacific also urges that the suit must fail because the old Houston Company is an indispensable party and has not been joined. The contention proceeds upon a misconception of the nature of the suit. Since its purpose is merely to hold the Southern Pacific as trustee for the plaintiffs individually of the property which it has received, the old Houston Company is in no way interested and would not be even a proper party."

Our action is stronger than the last cited case. The old Pacific Cold Storage Company is dissolved and our purpose is to hold the trustee Richardson for our ascertained certain specific sums of money belonging to us individually which he has misappropriated. Denman is asserting a right against and not through the Pacific Cold Storage Company. His wrong is an individual wrong, not a corporate wrong.

Defendant's citations offered in support of his objection that the corporation and its liquidators have not been made parties apply only to what are known as "stockholders' suits." A stockholder's suit is a creature of equity to enable the stockholder through the corporation to protect his ultimate, indirect, expectant, future prospective interests in property to which the corporation has the legal title and which has not been set apart for the stockholders. Our case relates wholly and altogether to funds actually set apart for shareholders and rightfully coming to them on disslution. When defendant urges that the company is an indispensable party, we

answer in paraphrase of the opinion of the Supreme Court in *Southern Pacific Co. v. Bogert,* 250 U. S. 483 (heretofore cited by us): Since our contention is merely to hold Richardson for the funds he has received, the old Cold Storage Company is in no way interested and would not even be a proper party.

Also as Judge Wallace said in *Erwin vs. O. R. & N. Co.,* 20 Fed. 577: The corporation could serve no other purpose than to divide the property among the beneficial owners; but here there is no trustee to dispute the legal title with the defendant; the relief granted will not affect the rights of other shareholders; the conventional relations between shareholders and corporation being at an end, defendant is in the position of a quasi trustee guilty of a fraudulent breach of his trust; that the right of action against him is *ex delcito* and the tort may be considered as several or joint without right of contribution between him and others who may have shared his guilt; that the shareholders have a right to pursue the fund wherever they find it.

Again we answer the defendant in paraphrase of the decision of the Ninth Circuit Appeals in *Barker vs. Edwards,* 259 Fed. 484: That as against liquidators acting under a statute like ours each shareholder may assert a legal as well as an equitable right as a tenant in common as against an unauthorized disposition of the property by the liquidators.

It almost looks as if defendant's attorneys had

used the citations of the losing parties in these last cited cases.

ACTION IS AT LAW

This action must be at law, not in equity. The attorney for the defendant is apparently again attempting to show that this action should have been brought in equity and not at law. The overwhelming weight of authority, state and federal, is against him. In a brief entitled "Memorandum of Authorities" showing that the court of law has jurisdiction in this case and not the court of equity, the court will find the following language:

The law controlling this case is found in Ruling Case Law, 10 R. C. L., page 274, where the note uses the following language:

> "The rule adopted in the great majority of American jurisdictions, however ,is that whenever a court of law is competent to take cognizance of a right, and power to proceed to judgment which affords a plain, adequate, and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury. And in some courts, *notably the Federal Courts,* this rule is made obligatory by virtue of the existence of an express statutory prohibition against a party pursuing his remedy in such cases in a court of equity."

Again the author says on page 276:

> "But as a general proposition it may be said that whenever the object of a bill in equity is to obtain only a decree for the payment of money by way of damages, it will not be sustained when

the like amount can be recovered at law in any action sounding in tort or for money had and received."

Pomeroy's Equity Jurisprudence, 3d edition, 1st vol., page 216, section 178, lays down the rule as follows:

"Even when the cause of action, based upon a legal right, does involve or present, or is connected with, some particular feature or incident of the same kind as those over which the concurrent jurisdiction ordinarily extends, such as fraud, accounting, and the like, still, if the legal remedy by action and pecuniary judgment for debt or damages would be complete, sufficient, and certain—that is, would do full justice to the litigant parties— in the particular case, the concurrent jurisdiction of equity does not extend to such case. For example, whenever an action at law furnish an adequate remedy, equity does not assume jurisdiction because an accounting is demanded or needed; nor because the case involves or arises from fraud; nor because a contribution is sought from persons jointly indebted; nor even to recover money held in trust, where an action for money had and received will lie."

The brief then cites *Buzard vs. Houston* (Tex.) 199 U. S. 347, 30 L. Ed. 451, and quotes from L. Ed. page 453, Judge Gray, to the following effect:

"The effect of the provision of the Judiciary Act, as often stated by this court, is that 'Whenever a court of law is competent to take cognizance fo a right, and has power to proceed to judgment which affords a plain, adequate and complete remedy, without the aid of a court of equity ,the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury."

We then cite *Hipp vs. Joly,* 60 U. S. 271, 15 L. Ed. 633; *Gaines vs. Miller,* 111 U. S. 395, 28 L. Ed. 466; *Patton vs. Major,* 46 Fed. 210; *Frank vs. Morley's Estate,* 64 N. W. 578.

On page six we quote from *Downs vs. Johnson* (Vt.) 56 Atl. 9, where it was held that

> "Where the only ground for equitable jurisdiction is that the money sought to be recovered is held in trust, the bill cannot be maintained, as money so held may be recovered in an action at law."

We also cite *Henchey vs. Henchey,* (Mass.) 44 N. E. 1075. In that case on page 1076 the court says:

> "Where there is or has been a trust, and it it the duty of the trustee to pay to his *cestui que* trust a definite sum of money on demand, and nothing else remains to be done, an action at law can be maintained by the *cestui que trust.*"

The language is peculiarly applicable to this case. All that remains to be done here is for the defendant Richardson to pay over the money due the plaintiff, and judgment for the amount due is a speedy and adequate remedy.

Collar vs. Collar, (Mich.) 42 N. W. 847.

Respectfully submitted.

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